**Taylor Motors, Inc. *and* American Federation of Government Employees (AFGE), AFL–CIO, Local 2022.** Cases 10–CA–141565, 10–CA–141578, 10–CA–145467, and 10–RC–137728

April 20, 2018

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On July 14, 2015, Administrative Law Judge Keltner W. Locke issued a decision in this proceeding. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. In that decision, the judge found, among other things, that the Respondent violated Section 8(a)(1) of the Act when it suspended and discharged employee Anthony Williams.

On March 13, 2017, the National Labor Relations Board remanded the case to the judge for further consideration of this finding.[1] The Board agreed with the judge that the Respondent held an honest belief that Williams had engaged in serious misconduct by uttering a threat of violence in the course of his otherwise-protected activity of encouraging his coworkers to vote for the Union in an election held on November 6, 2014. Accordingly, under the test set forth in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), the burden shifted to the General Counsel to show that Williams did not, in fact, utter this threat. In its decision remanding the case to the judge, the Board concluded that the judge did not clearly determine whether the General Counsel carried his burden in this regard. Accordingly, the Board directed the judge, on remand, to issue a supplemental decision that makes a clear and reasoned determination on this issue.

By agreement of the parties, the November 2014 election was set aside, and a second election was held on January 15, 2015. The tally of ballots cast in the second election showed 28 votes for and 33 against the Union, with 3 challenged ballots. In its decision remanding, the Board further directed the judge to determine whether to set aside the second election if he found that the General Counsel carried his burden of proof under *Burnup & Sims* and thus established that Williams' suspension and discharge violated the Act.[2]

On September 29, 2017, Judge Locke issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the judge's recommended Order as modified and set forth in full below.[4]

We agree with the judge, for the reasons he states in his supplemental decision, that the General Counsel met his burden under *Burnup & Sims*, above, of showing that Williams did not utter the threat attributed to him. Accordingly, we affirm the judge's finding that the Re-

[1] 365 NLRB No. 21.

[2] In his initial decision, the judge also found, as alleged in pars. 8 and 12 of the complaint, that the Respondent violated Sec. 8(a)(1) by maintaining a confidentiality/nondisclosure agreement, and the Board directed the judge to factor this finding into his determination of whether the second election should be set aside. However, the Board did not pass on this 8(a)(1) finding, and, for the reasons explained below, we conclude that the second election must be set aside whether or not the Respondent's confidentiality/nondisclosure agreement is unlawful. Having so concluded, we find that it will effectuate the policies of the Act to sever the allegations in paragraphs 8 and 12 regarding the Respondent's confidentiality/nondisclosure agreement and retain them for further consideration.

[3] The Respondent has excepted to some of the judge's credibility determinations. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that the judge's credibility resolutions were not based on his observation of the witnesses' testimonial demeanor. In these circumstances, the choice between conflicting testimony rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990), citing *El Rancho Market*, 235 NLRB 468, 470 (1978), enfd. mem. 603 F.2d 223 (9th Cir. 1979). Based on our independent review of these factors, we adopt the judge's credibility findings.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by interrogating Williams about his union activity. The Respondent's exceptions to this finding are solely based on the judge's credibility resolutions, which we have adopted in full.

[4] In accordance with the Board's decision in *King Soopers, Inc*., 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondent to compensate Williams for his search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In addition, we shall modify the judge's recommended tax compensation and Social Security reporting remedy in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016). We shall modify the judge's recommended Order to conform to this remedial change and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

spondent violated Section 8(a)(1) of the Act by suspending and discharging Williams.[5]

We further find that the results of the second election must be set aside based on the Respondent's unlawful suspension and discharge of Williams, which occurred during the critical period prior to that election.[6] "[I]t is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election.'" *Clark Equipment Co.*, 278 NLRB 498, 505 (1986) (quoting *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962)). The only exception to this policy is where the Board finds that it is "virtually impossible" to conclude that the unfair labor practice could have affected the results of the election. Id.

The Respondent does not contend that the "virtually impossible" exception applies to Williams' suspension and discharge, and in any event, we find that it does not. Williams was one of two employees who assisted in the Union's organizing drive, and he was an active and open union supporter. Moreover, Williams actively encouraged his fellow employees waiting in line to vote in the first election to vote for the Union, and he was unlawfully suspended the following day and discharged a week later, just two months before the second election, which the Union lost by a narrow five-vote margin. In these circumstances, it is far from virtually impossible to conclude that Williams' unlawful suspension and discharge could have affected the results of the second election. See *Lucky Cab Co.*, 360 NLRB 271, 277 (2014) (setting aside election the union lost by 12 votes based on unlawful discharges of 3 union organizing committee members), enfd. mem. 621 Fed. Appx. 9 (D.C. Cir. 2015). Accordingly, we will set aside the election held on January 15, 2015, sever Case 10–RC–137728 from the other cases in this consolidated proceeding, and remand that case to the Regional Director for further appropriate action.

[5] We find it unnecessary to pass on the judge's alternative finding that the alleged statement, if indeed uttered, would not have been sufficiently opprobrious to deprive Williams of the Act's protection. We also find it unnecessary to pass on the complaint allegation that Williams' suspension and discharge violated Sec. 8(a)(3) as well as Sec. 8(a)(1), as any such finding would not materially affect the remedy. See *Burnup & Sims*, 379 U.S. at 22 ("We find it unnecessary to reach the questions raised under § 8(a)(3) for we are of the view that in the context of this record § 8(a)(1) was plainly violated, whatever the employer's motive."); *Webco Industries*, 327 NLRB 172, 172 (1998), enfd. 217 F.3d 1306 (10th Cir. 2000).

[6] As we have set aside the election on these grounds, we find it unnecessary to pass on the judge's findings regarding the Union's Objection 8 concerning the Respondent's maintenance of the confidentiality/nondisclosure agreement.

## AMENDED CONCLUSIONS OF LAW

Replace the judge's Conclusion of Law 3 with the following paragraph.

"3. The Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities and by suspending and discharging employee Anthony Williams."

## ORDER

The Respondent, Taylor Motors, Inc., Fort Campbell, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities.

(b) Suspending or discharging its employees for engaging in protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Anthony Williams full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Anthony Williams whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Anthony Williams for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Anthony Williams, and within 3 days thereafter, notify him in writing that this has been done and that neither the suspension nor the discharge will be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel rec-

ords and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Fort Campbell, Kentucky facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on January 15, 2015, is set aside, and Case 10–RC–137728 is severed and remanded to the Regional Director for Region 10 to direct a third election whenever the Regional Director shall deem appropriate.

IT IS FURTHER ORDERED that the allegation that the Respondent violated Section 8(a)(1) by maintaining and requiring employees to sign its confidentiality/nondisclosure agreement is severed and retained for further consideration.

Dated, Washington, D.C. April 20, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union activities.

WE WILL NOT suspend and discharge you because you engage in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Anthony Williams full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Williams whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest, and WE WILL also make Williams whole for his reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Anthony Williams for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Anthony Williams, and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use his suspension and discharge against him in any way.

TAYLOR MOTORS, INC.

The Board's decision can be found at www.nlrb.gov/case/10-CA-141565 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

*Katherine Miller, Esq.,* for the General Counsel.
*Ms. Judy Hansford,* of Fort Campbell, Kentucky, for the Charging Party.
*Christopher Caiaccio, Esq.* and *Michael G. Johnson, Esq. (Christopher Caiaccio, Esq.),* of Atlanta, Georgia, and Nashville, Tennessee, for the Respondent.

## SUPPLEMENTAL DECISION

KELTNER W. LOCKE, Administrative Law Judge**.** On July 14, 2015, I issued an initial decision which found that the Respondent had unlawfully discharged its employee Anthony Williams. On March 13, 2017, the Board remanded the matter to me for further analysis and the preparation of a supplemental decision. For the reasons stated below, I find that the General Counsel has proven that an employee discharged for misconduct during the course of protected activity did not, in fact, engage in such misconduct, notwithstanding the Respondent's honest belief that he had. Therefore, I conclude that Respondent violated Section 8(a)(3) and (1) when it discharged the employee.

### Background

Under a contract with the United States Army, the Respondent operates school buses at Fort Campbell, Kentucky. Some of the school bus drivers and aides, desiring union representation, filed a petition with the Board. On November 6, 2014, the Board conducted an election at the Respondent's facility.

As the employees waited in line to cast their ballots, one of the drivers, Anthony Williams, enthusiastically urged other employees to vote for the Union. In general, Williams' statements advocating the Union constituted activity protected by the Act. However, I must decide whether Williams also made threatening statements outside the Act's protection. Although Williams denied making such threats, the Respondent held an honest belief that he did and, based on that belief, discharged him.

As discussed in the initial decision and the Board's remand order, a stark credibility conflict must be resolved. Two employees testified that, while waiting in line to vote in the Board conducted election, they heard Williams make a remark about hanging them if the Union did not win the election.

School bus driver Terrie Nolan testified that Williams said "if you do not vote yes, I'm going to hang I'm going to take a rope and hang you. I'm going to take a rope and hang you all by the neck like they did over on Litwin Street[1] and like you all did to us back in the '60s." Another school bus driver, Janice Schwenz, described hearing Williams tell some of those waiting to vote that when the election was over, it was "going to be like Burger King and have it our way." Then, according to Schwenz, someone asked Williams "what if it doesn't go your way?" Schwenz testified that Williams answered, "well, we'll just have to get some rope and do you guys like the Halloween thing over on Litwin and kind of like you guys did us back in the '60s."

Although Nolen and Schwenz testified that they heard Williams make the alleged threat, 3 other witnesses, whom I believed to have been within earshot at that time, did not hear it. Uncontradicted evidence established that Williams had an outgoing personality and spoke loudly. Therefore, I reasoned that if Williams indeed had made the statement which Nolen and Schwenz attributed to him, the other 3 witnesses would have heard it. Their testimony that they did not hear it led me to conclude that Williams had not made the threat.

The Board remanded the case with instructions to perform further factual and legal analysis. Among other matters, the Board directed me to evaluate and explain my conclusion that these 3 witnesses were "within earshot."

### Factual Analysis

#### Were Fenwick, Poston, and Dotson Within Earshot?

In performing this analysis, I will focus first on each of the 3 witnesses who testified that they did not hear the statements about hanging which Nolen and Schwenz attributed to Williams. These witnesses were Sandra Fenwick, Mary Jane Dotson, and Beate Poston. All 3 were eligible voters in the November 6, 2014 election.

The voting took place in a building, the bus barn, which had a large garage area sometimes called the bay, where mechanics could work on the buses. A smaller break room adjoined the garage area. The employees cast their ballots in this break

[1] The words "like they did over on Litwin Street" refer to a Halloween lawn display depicting a lynching. No one has claimed, and the record does not suggest, that any employee or official of the Respondent had anything to do with this display. Likewise, there is no suggestion or evidence that anyone associated with the Union bore responsibility for this display. However, its hateful and public nature had attracted news coverage, which in turn made the display a topic of conversation.

room, but it wasn't large enough to hold all the voters, so they lined up in the garage area.

On November 6, 2014, when Fenwick returned from her first run[2] and clocked out, which is the standard procedure, she saw that other employees already were lining up to vote in the representation election. Not wishing to wait in line a long time, she sat down at a table. Also sitting at this table were Williams and two other individuals. The 4 of them talked and joked.

At one point, Williams suggested that they get in line to vote. Fenwick told him she did not want to stand in line but preferred to wait a while at the table. She did wait there about 10 minutes.

From Fenwick's testimony, it is not clear whether Williams stayed at the table with Fenwick or else got in the line to vote. However, it would appear more likely that he stayed at the table with Fenwick and the others until Fenwick got up to join the line. Thus, Fenwick testified that when she did get in line, the only people near her were Williams and the other 2 individuals with whom she had been sitting at the table. She further testified that Williams was standing behind her in the line. Presumably, Williams would have been ahead of her in line if he had left the table earlier.

Additionally, Fenwick's testimony suggests that Williams did remain within earshot:

> Q. Is Anthony a loud person?
> A. Yes.
>
> Q. Were there times when he wasn't standing right near you?
> A. Not when I—not as long as I was in the bay, he wasn't.

Beate Poston was another of the 3 witnesses who testified that she did not hear Williams make the offensive remarks. However, her testimony differs significantly from Fenwick's. Poston testified that Williams went up and down the line of voters, showing them his cellphone, which displayed a prounion message on its screen. According to Poston, at one point Williams went up and down the line handing out pens bearing the name of the Union.

Poston's description of a highly ambulatory Williams does not accord with Fenwick's testimony that Williams was near her throughout the time she was in the bay area, which would indicate that Williams simply stood in line. Additionally, adding to the puzzle, Fenwick testified that she did not recall Poston being present on this occasion.

However, Poston did recall waiting in line to vote and becoming annoyed at Williams' efforts to persuade people to vote for the Union. Poston described Williams as "always on the loud side" but she did not hear everything Williams said as he walked up and down the line. She did notice that some people waiting in line appeared to be annoyed by Williams.

At times while Poston was standing in line, she was near Schwenz and therefore could have heard anything Williams said to Schwenz. However, her testimony indicates that she was not near Schwenz for the entire time she waited in line.

> Q. Did you hear [Williams] say anything to Janice [Schwenz] who was right in front of you?
> A. No.
>
> Q. You didn't hear anything?
> A. I didn't hear.
>
> Q. But she was right in front of you, correct?
> A. She was in front of me by the time we stepped up to vote, because there was an issue. She got conflicting messages from one of the ladies that took -- marked the names off, and one of the union ladies, and she was trying to clarify. And that's kind of what I remember. That's what I remember or when I remember her being in front of me.
>
> Q. When you first got in line, do you remember her being in front of you when it was near the back of the line?
> A. I couldn't swear to it.

Moreover, Poston did not remain in line the entire time. Poston testified that she became so annoyed at Williams' conduct that she left the line to complain about it.

> Q. Did you bring your concerns about the election to the attention of anybody at Taylor Motors?
> A. Well, at one point I left the line because I was so upset with Anthony [Williams] getting in everybody's face. And I didn't want to say anything out there, so, I stepped into the office and I just—it's just not right, you know, everything that's going on. We're just supposed to be able to stand in line, give our vote, and be done.

In sum, Poston was not within earshot of Williams the entire time that he tried to persuade those waiting in line to vote for the Union.

The third witness who did not hear Williams make any statement about hanging was Mary Jane Dotson. She testified that Williams spoke to many different people and that she did not hear everything that he said. Based on this further review of the testimony of the 3 witnesses, I conclude that I erred in assuming that all 3 were within earshot of Williams at all times while the employees were lined up to vote.

Credibility Analysis

Although the record does not establish that Fenwick, Poston and Dotson were present at all times, the crucial question concerns whether they were present at the time Williams allegedly made the offensive statement. That fact must be determined from the testimony of Nolen and Schwenz, the only two witnesses who testified that they heard Williams make the statement.

Nolen testified that Mary Dotson and Bea Poston were present when she heard Williams make the offensive statement:

> Q. Based on what you've already testified to, Janice and Mary and Bea Poston were all near you as well, correct?
> A. Yes.
>
> Q. When Anthony made this threat, did he specifically say it directed at you?
> A. He was looking at me.
>
> Q. Did he point at you in any way?
> A. He was looking at me.

[2] Each workday, Fenwick was on a school bus for 3 runs. She drove the bus one of those 3 runs and served as an aide on the other two.

Q. But he didn't point or anything?
A. No, but he was looking at me.

Q. Okay. But he was looking at you.
A. Yeah.

Q. When he said this, was he still being loud?
A. Yes.

Q. Did you say anything in response to Anthony making this threat?
A. I told him it wasn't very funny.

Q. Did he say anything in response to that?
A. He laughed.

Q. Did you make any comment about this statement to the other people you were in line next to?
A. I just looked at them, and they looked at me.[3]

Q. You looked at the people who were near you, Janice, Bea, and Mary.
A. Yes.

Q. And they just looked back at you?
A. Yes.

Q. Did you hear them say anything to Anthony?
A. No.

From context, it appears clear that "Janice" referred to Janice Schwenz, "Bea" referred to Beate Poston and "Mary" referred to Mary Dotson. In Nolen's account, Poston and Dotson not only were present but reacted to Williams' statement by exchanging glances. Yet neither Poston nor Dotson corroborated Nolen's testimony about what Williams said.

Schwenz' testimony indicates that she was standing in line near Nolen, Poston and Dotson. Therefore, it accords with Nolen's testimony regarding who was present. However, it contradicts Nolen concerning who reacted to the statement. Nolen's testimony, quoted above, indicates that after Williams made a statement about taking a rope and hanging them, Nolen was the only person present who replied to Williams. However, Schwenz' version does not cast Nolen in the role of responder.

Schwenz testified that Williams made the offensive statement in the presence of Poston and that *Poston* (not Nolen) was the person who said something in response. According to Schwenz, Poston reacted to Williams' statement by asking him to leave.[4] Poston's testimony confirms that she was standing in line behind Schwenz, but she denied hearing Williams make any statement about hanging.

Although Nolen and Schwenz do not agree on whether Poston replied to Williams' statement, they both testified that she was present when he made it. Poston clearly was near enough to hear Williams. Her failure to corroborate Nolen and Schwenz weighs particularly heavily because Williams' exuberant conduct had irritated her greatly. Indeed, Williams had annoyed Poston so much that she left her place in line and went to the manager's office to complain. Poston testified:

> Q. Did you bring your concerns about the election to the attention of anybody at Taylor Motors?
> A. Well, at one point I left the line because I was so upset with Anthony getting in everybody's face. And I didn't want to say anything out there, so, I stepped into the office and I just—it's just not right, you know, everything that's going on. We're just supposed to be able to stand in line, give our vote, and be done.

Considering that Poston was so upset about Williams that she left the line to complain, she almost certainly would have included in her complaint Williams' hanging statement had she heard it. Her testimony to the contrary directly and inescapably conflicts with that of Schwenz.

Yet, according to Schwenz, not only did Poston hear the statement, she also reacted to it. Schwenz testified:

> Q. When Anthony made the statement that you heard, that you wrote about, did anybody that you were near make any response back to it?
> A. When he made that statement about what would happen?
>
> Q. Um-hum.
> A. One of the girls told him that she thought it would be best if he just got away from us and got in line somewhere himself.
>
> Q. Who was that?
> A. Bea.[5]
>
> Q. When Anthony made this statement that you wrote about, the Litwin Street incident, did—other than Bea telling him to move on, did anybody else that you were around say anything to Anthony?
> A. Not that I know of.
>
> Q. I just want to make sure. You heard Bea tell him to just --
> A. Yes.
>
> Q. Again, in your own words, what did you -
> A. She just told him, Anthony, I think it would be best if you just got away from us, and went on and got in line, because we're going to vote the way we want to, and you vote, you do the same.

Schwenz' description of what Poston told Williams is quite specific, yet Poston did not corroborate it. Could that failure to corroborate be the result of an intentional forgetfulness, of a deliberate decision not to remember? That seems highly unlikely. The record does not suggest that Poston had any motive to avoid telling the truth. Poston had complained to management about Williams' conduct during the election and

[3] In the remand order, the Board specifically directed that I discuss this testimony about an exchange of glances.

[4] The Board's remand order specifically directed me to address this matter. It stated, in part, "the judge noted that although Schwenz testified that Poston responded to Williams by asking him to leave, Poston testified that she did not hear Williams' statement." Schwenz testified on the first day of the hearing. Poston testified on the second day. Thus, Poston would have had an opportunity to deny asking Williams to leave but neither attorney questioned her about it. Presumably, in view of Poston's denial that she heard Williams make the statement in question, she would have denied reacting to it.

[5] From the record, it appears clear that "Bea" is Beate Poston.

had nothing to gain by testifying in Williams' favor. She remained an employee of the Respondent at the time of the hearing, and testimony that Williams had made the offensive statement would have been in the Respondent's favor.

Likewise, Mary Jane Dotson remained employed by the Respondent at the time she testified. If she had testified that Williams had made the offensive statement attributed to him by Nolen and Schwenz, it would have aided the Respondent's case. Yet, although both Nolen and Schwenz testified that Poston and Dotson were present when Williams made the statement, neither Poston nor Dotson corroborated it.

The testimony of Nolen and Schwenz does not evenly balance that of Poston and Dotson. Nolen and Schwenz disagree about who replied to Williams' statement and this conflict in the evidence diminishes, to some extent, my confidence in the reliability of their testimony. Therefore, even apart from Williams' denial that he made the statement, the scales tip against finding that he did.

Moreover, I credit Williams' testimony that he did not make the statement attributed to him. Although the inconsistency between the testimony of Nolen and Schwenz lessens the credence I place in it, the apparent reliability of Williams' testimony remains undiminished. Crediting Williams, I find that he did not make the offensive hanging statement which Nolen and Schwenz attributed to him.

## Legal Analysis

Although the initial decision described the correct procedure to use in examining the facts, I then made a mistake in following it. My error involved assuming that a failure to prove that Williams made the offensive statement was the same thing as proving that he did not make the statement. The difference may be illustrated by imagining the scales of justice, with the left pan marked "Did" and the right pan marked "Did Not."

If the evidence in the "Did" pan weighs exactly the same as that in the "Did Not" pan, the scales are balanced and neither pan is lower than the other. If the evidence in the "Did" pan weighs a tiny bit more than the evidence in the "Did Not" pan, the "Did" pan goes down and the "Did Not" pan goes up. That signifies that "Did" has been proven by a preponderance of the evidence. Likewise, if evidence in the "Did Not" pan weighs slightly more than evidence in the "Did" pan, the "Did Not" pan goes down and "Did Not" has been proven by a preponderance of the evidence.

When one side of the scale goes down, the other side goes up, leading me to assume, incorrectly, that a failure to prove "Did" proves "Did Not." However, that is not the case when the scales are evenly balanced, with neither side higher or lower than the other. In that case, a preponderance of the evidence does not prove "Did," but a preponderance of the evidence also does not prove "Did Not." In the initial decision, I had found the scales about evenly balanced, with evidence that Williams did make the offensive statement weighing about the same as the evidence that he did not.

Because the Respondent discharged Williams for engaging in misconduct, and because this asserted misconduct took place in the course of activity protected by the Act, I followed the analytical process set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), and its progeny. Analyzing the evidence, I concluded that Williams was engaged in protected activity when, on the day of the election, he tried to persuade fellow employees to vote for the Union. Additionally, I found that when the Respondent decided to discharge Williams, it held an honest belief that Williams had engaged in misconduct making the offensive statement about hanging people - during the course of that protected activity. Up to this point, my analysis was uneventful, but at the next step I erred.

Under the *Burnup & Sims* framework, once an employer has shown that it acted with an honest belief that the discharged employee had engaged in misconduct, the burden shifts to the General Counsel to show that the employee did not, in fact, engage in the asserted misconduct. *Pepsi-Cola Co.*, 330 NLRB 474 (2000). My weighing of the evidence had led me to conclude that preponderance did not prove that Williams had engaged in the asserted misconduct. Then, I mistakenly assumed that this failure to prove misconduct equaled proof that the asserted misconduct had not, in fact, occurred. However, when the scales are evenly balanced, a failure to prove "Did" falls short of proving "Did Not."

This flawed logic led me to conclude that the government had met its burden. As discussed above, the Board's remand order directed me to perform a fresh factual analysis which included discussion of certain specified issues. This fresh analysis did not rest on the erroneous premise that a failure to prove "Did" equals proof of "Did Not." Rather, the additional examination of the evidence led me to discredit the testimony, by Nolen and Schwenz, that Williams had made the "hanging" statement. It also led me to credit Williams' denial.

Based on these credibility determinations, I further conclude that the General Counsel has proven that the asserted misconduct did not, in fact, occur. Accordingly, I recommend that the Board find that by discharging Williams, the Respondent violated Section 8(a)(3) and (1) of the Act.

Should the Board disagree with my conclusion that the General Counsel has proven that the misconduct did not occur, one further matter should be addressed. When the evidence establishes that misconduct has taken place, the Board must then decide whether the misconduct was so opprobrious that it forfeited the protection of the Act. The initial decision expressed the opinion that, even if Williams had made the offensive statement, that misconduct was not sufficiently opprobrious to deprive him of the Act's protection.[6]

In weighing the opprobriousness of the statements which Schwenz and Nolen attributed to Williams, I apply the Board's longstanding objective standard. In *Gem Urethane Corp.*, 284 NLRB 1349, 1353 (1987), the Board, citing *Clear Pine Mouldings*, 268 NLRB 1044 (1984), noted that, in considering a statement made by one employee to another, it had adopted the objective test formulated by the Court of Appeals for the

[6] It may be noted that the initial decision did not call the words attributed to Williams "unobjectionable." Nothing written in that decision or here should be read to suggest condonation of those words. However, the issue does not concern whether these words were good or bad but rather how bad.

Third Circuit in *NLRB v. W. C. McQualde, Inc.,* 552 F.2d 519 (1977). There, the court stated that an employer need not "countenance conduct amounting to intimidation and threats of bodily harm." The criterion was whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. *NLRB v. W. C. McQualde, Inc.*, 552 F.2d at 528, quoting *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852-853 (3d Cir. 1964), cert. denied 379 U.S. 826.

This objective test focuses on whether a listener reasonably would feel threatened by the words spoken. In making this determination, it is important to sort out other emotions which the particular statement may have elicited. The remarks attributed to Williams allude to a Halloween display on the front yard of someone totally unconnected to this case. The display depicted a lynching of people with black faces. Such an ugly display refers to a hateful period in history and therefore evokes strong feelings of repugnance, but these emotions are not necessarily the same as intimidation or a fear of violence. The test is not whether a reasonable person would feel offended by a reference to this display but whether a reasonable person, under the totality of circumstances, would feel intimidated or afraid.

One other confounding factor could make application of the objective test more challenging and, because of this possibility, it needs to be discussed. Racial prejudice can exist not only at a conscious level but also at an unconscious level, where it can add an undetected bias. A judge always should guard against such bias but it is particularly important to do so here because the words attributed to Williams concern race.

At one time in certain parts of the country, the dominant social norms included an expectation that people of color should act in a deferential manner when speaking to white people. That expectation of deference was particularly strong when a black man was addressing a white woman. The present case concerns such a situation. If that old prejudice survives somewhere out of sight in the unconscious mind, it could cause a disproportionate reaction to the words attributed to Williams. A reaction to the perceived temerity of the speaker could improperly affect a decision concerning what message the words reasonably would communicate. In applying the Board's objective test, I posit a hypothetical reasonable person whose perception and understanding are not distorted by such a prejudice.

The Board's objective standard requires considering the totality of circumstances. Those circumstances certainly include the speaker's demeanor. The same words can convey entirely different messages depending on whether the speaker is smiling or glaring. It was proper to take into account Williams' happy demeanor in determining how a reasonable person would interpret the words attributed to him. A reasonable person, seeing his jovial mood, would regard the words as attempted humor, not attempted intimidation.

It is true that if a manager says something to a worker which communicates a threat of reprisal for protected activity, the manager cannot get off the hook by saying, "I was just joking." The employee knows that the manager is in a position of authority and has the power to carry out such a threat. That ability affects the import of the manager's words.

Additionally, employers discharge employees all the time, which increases the likelihood that an employee would take a threat of termination seriously. However, hangings are rare. Moreover, nothing in the record suggests that Williams had either the ability or the intention to hang anyone.

Considering the totality of circumstances, I would conclude that the words attributed to Williams would not communicate to a reasonable person any threat or be regarded as an attempt to intimidate. Rather, they would be viewed as a failed attempt at humor.[7] However, I need not reach this issue because, crediting Williams' denial and discrediting the testimony of Schwenz and Nolen to the contrary, I find that Williams did not, in fact, speak these words.

Having concluded that the General Counsel has proven that the asserted misconduct did not, in fact, occur, notwithstanding the Respondent's honest belief that it did, I recommend that the Board find that by suspending and discharging Williams, the Respondent violated Section 8(a)(3) and (1) of the Act.

The Representation Election

The Board also directed me to consider "whether the 2015 election should be set aside. In reaching this determination, the judge should consider the Respondent's suspension and discharge of Williams should he again find that these actions were unlawful in addition to the Respondent's maintenance of the Agreement, which the judge found violated Section 8(a)(1) of the Act."

On December 8, 2014, the Respondent and the Union entered into a stipulation, approved by the Regional Director, to set aside the November 6, 2014 election and to conduct a new one. That election took place on January 15, 2015. The tally of ballots, prepared immediately after this election, showed that of about 67 eligible voters, 28 cast ballots for the Union and 33 against. Three voters cast challenged ballots, which were too few to be determinative.

For the reasons discussed above, I have concluded that Respondent's discharge of Williams violated the Act. This termination of employment related directly to Williams' activity on November 6, 2014, before and during the representation election. Respondent has not remedied this unfair labor practice. Respondent's discharge of Williams was effective November 7, 2014, which was slightly more than 2 months before the second election. The coercive effect of the unremedied unfair labor practice persisted during this period.

Additionally, for the reasons stated in the initial decision, I have found that the Respondent unlawfully required employees to sign a confidentiality agreement prohibiting them from disclosing, among other things, "compensation data" and "personnel/payroll records, and conversations between any

[7] In reaching this conclusion that the words attributed to Williams reasonably would be regarded as attempted humor rather than threat, I am not relying on Nolen's testimony that, in response to those words, she "told him it wasn't very funny." For the reasons discussed above, I do not credit Nolen's testimony that Williams made the "hanging" statement, and likewise do not credit the testimony regarding her reply to it.

persons associated with the company." Employees reasonably would understand "compensation data" to include their pay rates and benefits. Moreover, the prohibition on disclosing "conversations between any persons associated with the company" would limit their ability to speak with Union representatives, and with each other, concerning what transpired at work. It therefore also would prevent them from bringing problems to the Union's attention and discussing with Union representatives what the Union would do to remedy the problems if it became the employees' bargaining representative.

This prohibition chilled discussions about terms and conditions of employment and thereby destroyed the laboratory conditions necessary for a fair and uncoerced election. Moreover, the January 15, 2015 election was quite close. If only a few employees had changed their votes, it could have affected the outcome.

The violative conduct is not so minimal or isolated that it would be possible to conclude that it did not affect the election. Accordingly, I find that these violations of the Act require that the election be set aside. *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001).

In sum, I find merit to the Union's objections n recommend that the Board set aside the January 15, 2015 election.

Summary

To summarize, for the reasons discussed above, I have credited Williams' denial, discredited the testimony of Nolen and Schwenz to the contrary, and found that Williams did not make the "hanging" statement which Nolen and Schwenz attributed to him. Therefore, I have concluded that the General Counsel has proven that the claimed misconduct did not occur, notwithstanding the Respondent's honest belief that it had. Accordingly, I also have concluded that the Respondent's suspension and discharge of Williams violated Section 8(a)(3) and (1) of the Act.

Further, for the reasons stated in the initial decision, I have found that the Respondent violated the Act by requiring employees to sign a confidentiality agreement which interfered with their Section 7 right to discuss their terms and conditions of employment.[8]

Additionally, I have concluded that the Respondent's unfair labor practices warrant setting aside the January 15, 2015 election, and recommend that the Board do so.

CONCLUSIONS OF LAW

1. The Respondent, Taylor Motors, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, American Federation of Government Employees, Local 2022, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities; by requiring employees to sign an overly-broad confidentiality/nondisclosure agreement which reasonably would cause employees to believe that they could not engage in certain activities, such as the discussion of wages and working conditions, protected by Section 7 of the Act; and by suspending and discharging employee Anthony Williams.

4. The Respondent did not violate the Act in any other manner alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[9]

ORDER

The Respondent, Taylor Motors, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities or sympathies or those of other employees.

(b) Requiring employees to sign any agreement which they reasonably would understand to limit their right to discuss wages or other terms and conditions of employment or to engage in other activities protected by the National Labor Relations Act.

(c) Discouraging employees from engaging in protected activity by suspending, discharging, or taking other adverse action against employees who have engaged in such activity and did not engage in serious misconduct during the course of that protected activity.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its confidentiality/nondisclosure agreement and provide each employee who received and/or signed this agreement a written notification that the agreement has been rescinded.

(b) Within 14 days of this Order, offer Anthony Williams immediate and full reinstatement to his former job, of, if that position is no longer available, to a substantially equivalent position.

(c) Make Anthony William whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

[8] The Board has directed that I include a recommended order in this supplemental decision. That order also addresses findings in the initial decision which are not before me on remand, notably, the finding that the Respondent unlawfully interrogated employees concerning their protected activities. Because the recommended order includes a remedy for this unlawful interrogation, I also have included a reference to it in the conclusions of law.

[9] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(d) Compensate Anthony Williams for any adverse tax consequences of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension discharge of Anthony Williams and, within 3 days thereafter, notify him in writing that this has been done and that neither the suspension nor the discharge will not be used against him in any way.

(f) Within 14 days after service by the Region, post at its facilities at Fort Campbell, Kentucky, copies of the Notice to Employees attached as "Appendix A" to the July 14, 2015 initial administrative law judge's decision in this matter.[10] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2014. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 29, 2017

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT interrogate our employees about employees' Union or protected, concerted activities.

WE WILL NOT require employees to sign a confidentiality agreement which limits or reasonably could be understood to limit their right to discuss wages, hours, or other terms and conditions or to engage in other activities protected by federal law and WE WILL NOT enforce any such agreements that employees already have signed.

WE WILL NOT suspend or discharge employees for discussing the Union with employees or engaging in other activities protected by federal law.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL immediately rescind the confidentiality agreements which employees have signed and notify these employees that it no longer is in effect.

WE WILL, within 14 days from the date of the Board's Order, offer Anthony Williams full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Williams whole, with interest, for all losses of earnings and other benefits he suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any references to the unlawful suspension and discharge of Anthony Williams and WE WILL, within 3 days thereafter, notify him that the discharge will not be used against him in any way.

TAYLOR MOTORS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-141565 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."